IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CHARLES E. SMITH and AUDREY SMITH — PLAINTIFFS

vs. — Civil Action No. 4:96cv69-D-B

BARNEY LUTHER, in his individual capacity,
and the MISSISSIPPI STATE TAX COMMISSION — DEFENDANTS

MEMORANDUM OPINION

Presently before the court is the motion of the defendants to dismiss, or in the alternative, for the entry of summary judgment on their behalf. Finding the motion only partially well taken, the court shall grant it in part and deny it in part.

I. FACTUAL BACKGROUND

Robert Sistrunk and Defendant Barney Luther were employed as Special Agents of the Mississippi State Tax Commission ("MSTC") in 1994. On or about October 26 of that year, Sistrunk and Luther were in Bolivar County, Mississippi, seeking to execute on a Distress Warrant issued by the MSTC against the plaintiffs in this cause for their failure to pay a state tax liability. Particularly, the agents were interested in the location of a 1987 Buick automobile owned by the plaintiffs. After once conversing with the plaintiff Charles Smith about the Buick and looking for it, Sistrunk and Luther again confronted Mr. Smith about the location of the Buick while at a used car lot in Cleveland, Mississippi.

Further, the defendants claim that while at the car lot:

> Mr. Smith told Officer Luther that he was leaving and got into [an] automobile. Officer Luther told Mr. Smith to get out of the automobile, and told him he would be arrested if he left the scene. Mr. Smith responded by telling the officers to do what they had to do and drove away in what appeared to be a reckless fashion.

Defendants' Brief in Support of Consolidated Motions to Dismiss and for Summary Judgment, p. 3. The plaintiffs submit that this is untrue. While agreeing that they spoke at the car lot and that he left, Mr. Smith states that the officers never informed him that he was under arrest or would be placed under arrest if he attempted to leave.

In any event, after Mr. Smith left the car lot, the officers obtained an arrest warrant from a Cleveland municipal judge for Mr. Smith on three misdemeanor charges: 1) resisting arrest, 2) refusing to comply with the request of a law enforcement officer, and 3) reckless driving. Sistrunk and Luther, accompanied by several other officers, then went to the plaintiffs' home that evening and arrested Mr. Smith on the warrant. Apparently, Mr. Smith pled *nolo contendere* before the municipal court judge to the reckless driving and failure to comply charges, and the resisting arrest charge was dismissed by motion of the prosecutor. As a result, the municipal court judge fined Mr. Smith and gave him a suspended sentence. Mr. Smith appealed his conviction to the County Court of Bolivar County, Mississippi, where he received a *de novo* trial and was acquitted of the charge of reckless driving. Further, the judge declared a mistrial on the failure to comply charge, and by subsequent order "remanded to the files" that matter. To the extent of the court's knowledge, the charge has never been reinstated against Mr. Smith.

The plaintiffs then instituted this action, charging the defendants with liability for several intentional torts as well as for violation of their civil rights under 42 U.S.C. § 1983. After the filing of their complaint, the plaintiffs made their initial disclosures as required by this district's Uniform Plan to implement the provisions of the Civil Justice Reform Act. Uniform Plan, Section Four (I)(A)(1)(a). The defendants filed their answer on March 18, 1996, but failed to submit their initial disclosures as required by the Uniform Plan. This court is aware of no attempt by the defendants to seek relief from the requirements of initial disclosure, and by all accounts it appears that the defendants unilaterally decided not to comply.[1] On April 24, 1996, the defendants filed their

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[1] While the defendants did indeed later obtain from the court a stay of discovery, they did not seek any relief *prior to* the time they were required to make their initial disclosures. It appears to the court that the defendants had determined to not disclose certain materials regardless of this court's rules:

> [I]t was decided early on in this proceeding that the transcript of the arrest would not be revealed to the plaintiffs until the plaintiffs had committed themselves on their version of what was done and said at the time of the arrest . . . .

Letter to the Court by the Defendants (June 27, 1996). In that the defendants had no order from this court relieving them of the obligation at the time, the existence of these audio tapes should have been revealed in their initial disclosures. Uniform Plan, Section Four (I)(A)(1)(b). The defendants' "fast and loose" attitude towards this court's rules is not amusing, and any further such unilateral actions in violation of the rules shall result in appropriate sanctions.

"Motion to Dismiss and for Summary Judgment," which this court takes up today. Not long after, on April 30, 1996, Magistrate Judge Eugene M. Bogen stayed discovery in this action in light of the defendant Luther's anticipated qualified immunity defense.

II. THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The undersigned is of the opinion that consideration of a motion for summary judgment is entirely inappropriate at this juncture of the present proceedings. The defendants should not be entitled to block the plaintiffs from discovery and then submit undisclosed materials to the court, leaving the plaintiffs unable to properly respond. As Chief Judge Senter of this district noted on a previous occasion:

> In this court's view, it is inappropriate for [the] defendants to gain shelter from discovery under the qualified immunity shield while simultaneously attacking plaintiff with documentary evidence from which he cannot defend himself because of the discovery stay. Where that appears to be the course that defendants of this type are pursuing, the court would suggest that the magistrate judge fashion an appropriate discovery order which will not only protect those asserting the qualified immunity defense but also those faced with . . . motions for summary judgment.

Davis v. Tri-County Narcotics Task Force, Civil Action No. 1:95cv55-S-D (N.D. Miss. Feb. 11, 1996) (Senter, C.J.) (Order Denying Motion to Dismiss and/or for Qualified Immunity). While the defendant Luther might eventually be entitled to the protection of qualified immunity upon consideration of the merits of this cause, the court will not take up consideration of the matter in a vacuum, nor will the court allow the defendants to "ambush" the plaintiffs with undisclosed evidence. As such, the court will only consider the defendants' motion as a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

III. STANDARD FOR A MOTION TO DISMISS

A Rule 12(b)(6) motion is disfavored, and it is rarely granted. Clark v. Amoco Prod. Co., 794 F.2d 967, 970 (5th Cir. 1986); Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981). Dismissal is never warranted because the court believes the plaintiff is unlikely to prevail on the merits. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). Even if it appears an almost certainty that the facts alleged cannot be proved to support the claim, the complaint cannot

be dismissed so long as the complaint states a claim. Clark, 794 F.2d at 970; Boudeloche v. Grow Chem. Coatings Corp., 728 F.2d 759, 762 (5th Cir. 1984). "To qualify for dismissal under Rule 12(b)(6), a complaint must on its face show a bar to relief." Clark, 794 F.2d at 970; see also Mahone v. Addicks Util. Dist., 836 F.2d 921, 926 (5th Cir. 1988); United States v. Uvalde Consol. Indep. Sch. Dist., 625 F.2d 547, 549 (5th Cir. 1980), cert. denied, 451 U.S. 1002. Dismissal is appropriate only when the court accepts as true all well-pled allegations of fact and, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Thomas v. Smith, 897 F.2d 154, 156 (5th Cir. 1989) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 100-02, 2 L.Ed.2d 80 (1957)); see Mahone, 836 F.2d at 926; McLean v. International Harvester, 817 F.2d 1214, 1217 n.3 (5th Cir. 1987); Jones v. United States, 729 F.2d 326, 330 (5th Cir. 1984). While dismissal under Rule 12(b)(6) ordinarily is determined by whether the facts alleged, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings. Clark, 794 F.2d at 970; Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982), cert. denied, 459 U.S. 1105.

IV. DISCUSSION

A) ELEVENTH AMENDMENT IMMUNITY

1. MISSISSIPPI STATE TAX COMMISSION

Where, as here, the state has not consented to suit, "a suit in which the state or one of its agencies is named as a defendant is normally proscribed by the Eleventh Amendment." Brandley v. Keeshan, 64 F.3d 196, 199 (5th Cir. 1995) (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984)). Federal law claims arising under § 1983 are so precluded. Voisin's Oyster House, Inc. v. Guidry, 799 F.2d 183, 186 (5th Cir. 1986); Jett v. Dallas Indep. Sch. Dist., 798 F.2d 748, 762 n.13 (5th Cir. 1986); Davis v. Department of Health, 744 F.Supp. 756, 758 n.1 (S.D. Miss. 1990).

However, the plaintiffs argue to the court that the State of Mississippi has indeed waived its

Eleventh Amendment immunity as to its liability for the actions of defendant Luther in the case at bar. Specifically, the plaintiffs argue that pursuant to Miss. Code Ann. § 27-7-67, the State "must indemnify and hold harmless a special agent of the Mississippi State Tax Commission [such as Luther] of any liability in the execution of a tax warrant." Plaintiff's Response, ¶ 2. The plaintiffs draw out of this provision a waiver of Eleventh Amendment immunity on behalf of the state, but this court does not agree. In order for a state to waive its immunity under the Eleventh Amendment, the court must determine that the waiver is "stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305-06, 109 L.Ed.2d 264, 272-73, 110 S.Ct. 1868 (1990) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40, 87 L.Ed.2d 171, 105 S.Ct. 3142 (1985)). Because a state does not waive its Eleventh Amendment immunity by consenting to suit in its own courts, the waiver must specify the state's intention to be subject to suit *in federal court* before it can be effective. Port Auth., 495 U.S. at 306, 109 L.Ed.2d at 273. The language of the Mississippi statute in question is as follows:

> § 27-7-67 Sheriff and special agent not personally liable.
>
> Every warrant issued to a sheriff of any county of this state or to a special agent of the state tax commission shall provide that the state tax commission will indemnify and save harmless the said sheriff or special agent against all damages which he may sustain in consequence of the seizure or sale of the property, and the commissioner is hereby authorized to pay all obligations, which may accrue by reason of the issuance and execution of any warrant authorized by sections 27-7-55 to 27-7-65, out of funds appropriated by the legislature to defray the expenses of the state tax commission. Any claimant accepting any payment authorized to be made by the commissioner under the provisions of this section shall be barred of any action against the sheriff or special agent of the tax commission for damages sustained by the same as a consequence of the levying of process authorized by sections 27-5-55 to 27-7-65.

Miss. Code Ann. § 27-7-67 (1972). Nothing in the statute lends itself to a fair reading that encompasses Mississippi's consent to suit in federal court. The undersigned cannot say that this statute alone constitutes a sufficient waiver of Eleventh Amendment immunity on behalf of the state. See, e.g., In re Sec. of Dept. of Crime Control, 7 F.3d 1140, 1144-48 (4th Cir. 1993); Burk v. Beene, 948 F.2d 489, 493-94 (8th Cir. 1991); Williams v. Bennett, 689 F.2d 1370, 1376 (11th Cir.

1982). This is not to say, however, that the plaintiffs' argument would not prevail in other contexts. E.g., Hankins v. Finnel, 964 F.2d 853, 858 (8th Cir. 1992) (finding state of Missouri made limited waiver of Eleventh Amendment protection); Laurence H. Tribe, *American Constitutional Law*, p. 132-33 n.22 (noting that "the state's voluntary extension of indemnification could be construed as a waiver of eleventh amendment immunity."). It is sufficient to note that the state has not waived its protection of immunity in this case. That the state is entitled to the protection of the Eleventh Amendment in this case does not mean that it may be entirely dismissed from this action. Unlike the claims for monetary damages, the protection of the Eleventh Amendment does not serve as an all-encompassing bar to the plaintiffs' claims for injunctive and declaratory relief in this case. Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); Roos v. Smith, 837 F. Supp. 803, 806 (S.D. Miss. 1993). Insofar as the plaintiff has stated claims for money damages against the defendant MSTC, those claims shall be dismissed.

2. BARNEY LUTHER

The protection of the Eleventh Amendment also extends to actions against state officials in their official capacity, for such is in effect an action against the state. Will v. Michigan Dep't of State Police, 491 U.S. 58, 70-71 n.10, 109 S.Ct. 2303, 2312, 105 L.Ed.2d 45 (1989); Wallace v. Texas Tech. Univ., 80 F.3d 1042 (5th Cir. 1996). Thus, to the extent that the plaintiff seeks to pursue claims for money damages against defendant Luther in his official capacity,[2] those claims are also barred by the Eleventh Amendment. The protection, however, ends there. Actions for monetary damages brought under § 1983 against state officials in their individual capacity are not barred by the Eleventh Amendment. E.g., Kentucky v. Graham, 473 U.S. 159, 165-70, 105 S.Ct. 3099, 3104-08, 87 L.Ed.2d 114 (1985); Wilson v. UT Health Ctr., 973 F.2d 1263, 1271 (5th Cir. 1992); Leland v. Mississippi St. Bd. of Registration, 841 F.Supp. 192, 196 (S.D. Miss. 1993); Roos, 837 F.Supp. at

[2] The plaintiff's complaint does not indicate that Luther is sued in his official capacity, for Luther's only designation as a defendant is "Barney Luther, in his individual capacity." Contradictively, one of the plaintiffs' submissions to the court states "[s]ince Barney Luther has *not* been sued in his individual capacity . . ." Plaintiffs' Response to Consolidated Motion to Dismiss or for Summary Judgment, p.2 (emphasis added).

809. Likewise, in the same manner as the claims for monetary damages, the Eleventh Amendment does not prevent a plaintiff from proceeding against an individual defendant in his or her official capacity in order to obtain injunctive or declaratory relief. Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); Wallace v. Texas Tech. Univ., 80 F.3d 1042 (5th Cir. 1996); Leland, 841 F.Supp. at 196. In this instance, it is also well-settled law that qualified immunity under § 1983 offers no protection for claims of injunctive or declaratory relief. Mangaroo v. Nelson, 864 F.2d 1202, 1208 (5th Cir. 1989).

B) QUALIFIED IMMUNITY UNDER § 1983

Even though the Eleventh Amendment does not bar individual capacity suits against state officials, those officials are still entitled to the protection of qualified immunity for those claims under the appropriate circumstances. Wallace, 80 F.3d at 1051 n.10; Roos, 837 F. Supp. at 806. Whenever qualified immunity is asserted as an affirmative defense, resolution of the issue should occur at the earliest possible stage. Anderson v. Creighton, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987); Elliott v. Perez, 751 F.2d 1472, 1478 (5th Cir. 1985). Issues of qualified immunity are determined from the face of the pleadings and without extended resort to pre-trial discovery. Babb v. Dorman, 33 F.3d 472, 477 (5th Cir. 1994). Public officials, including law enforcement officers such as the defendant Luther, are entitled to assert the defense of qualified immunity in a § 1983 suit for discretionary acts occurring in the course of their official duties. Harlow v. Fitzgerald, 457 U.S. 800, 806, 102 S. Ct. 2727, 73 L.Ed.2d 396, 403 (1982); Gagne v. City of Galveston, 805 F.2d 558, 559 (5th Cir. 1986); Jacquez v. Procunier, 801 F.2d 789, 791 (5th Cir. 1986).

Public officials are shielded from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Davis v. Scherer, 468 U.S. 183, 194, 104 S. Ct. 3012, 3019, 82 L.Ed.2d 139 (1984); Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); White v. Walker, 950 F.2d 972, 975 (5th Cir. 1991); Morales v. Haynes, 890 F.2d 708, 710 (5th Cir. 1989). Stated

differently, qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

The first step in the inquiry of Luther's claim of qualified immunity is whether the plaintiff has alleged the violation of a clearly established right. Siegert v. Gilley, 500 U.S. 266, 111 S. Ct. 1789, 114 L.Ed.2d 277, 287 (1991). This inquiry necessarily questions whether or not the officer acted reasonably under settled law in the circumstances with which he was confronted. Hunter v. Bryant, 502 U.S. 224, 112 S. Ct. 534, 116 L.Ed.2d 589, 596 (1991); Lampkin v. City of Nacogdoches, 7 F.3d 430 (5th Cir. 1993). "If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity." Blackwell v. Barton, 34 F.3d 298, 303 (5th Cir. 1994) (quoting Pfannstiel v. Marion, 918 F.2d 1178, 1183 (5th Cir. 1990)). Even if Luther violated the plaintiffs' constitutional rights, he is entitled to immunity if his actions were objectively reasonable. Blackwell, 34 F.2d at 303.

Whenever plaintiffs sue public officials under 42 U.S.C. § 1983, this court must insist on heightened pleading on the part of the plaintiff.[3] Morin v. Caire, 77 F.3d 116, 121 (5th Cir. 1996); Schultea v. Wood, 47 F.3d 1427, (5th Cir. 1995) (*en banc*). First, this court demands that a plaintiff provide a "short and plain statement of his complaint, a complaint that rests upon more than conclusions alone." Morin, 77 F.3d at 121; Schultea, 47 F.3d at 1433. Secondly, the court may exercise its discretion to require the plaintiff to file a reply to the defendant's answer on the issue of qualified immunity. Morin, 77 F.3d at 121; Schultea, 47 F.3d at 1434.

The plaintiffs' complaint goes into some detail as to their § 1983 claims against the defendant Luther. In addition, this court previously directed the plaintiffs to file a reply to the

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[3] However, the Fifth Circuit has recently indicated that the matter of requiring such heightened pleading is purely a matter of the district court's discretion:

> [T]here no longer exists a *per se* "heightened" pleading requirement in qualified immunity cases. . . . Rather, in such cases any requirement that a plaintiff clarify the allegations set forth in his or her complaint arises solely out of the district court's discretionary authority to order a reply to a defendant's proffer of a qualified immunity defense.

Brown v. Valmet-Appleton, 77 F.3d 860, 863 n.11 (5th Cir. 1996) (internal citation omitted).

defendants' answer in this matter, pursuant to Federal Rule of Civil Procedure 7(a) and the Schultea decision. Smith v. Luther, Civil Action No. 4:96cv69-D-B (N. D. Miss. May 2, 1996) (Davidson, J.) (Order Denying Motion to Stay and Ordering Reply). Upon careful review of the factual allegations both in the complaint and in the plaintiffs' Rule 7(a) reply, the undersigned is of the opinion that the Smiths have alleged more than sufficient facts to overcome defendant Luther's assertion of the defense of qualified immunity. That the defendants may disagree with the plaintiffs' factual assertions is of no import, for at this stage of the proceedings the court is not concerned with the ultimate resolution of such issues. The plaintiffs have met their obligation of "heightened" pleading in this cause. Further, upon consideration of the pleadings in this action and the plaintiffs' Rule 7(a) reply, the undersigned cannot say that "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." The defendants' motion shall be denied as to the defendant Luther's assertion of qualified immunity.

C) STATUTE OF LIMITATIONS

In their complaint, the plaintiffs seek recovery under several intentional tort theories - false arrest, false imprisonment, malicious prosecution and abuse of process. As the defendants correctly note, these state-law theories are governed by a one year statute of limitations under Mississippi statutory law. Miss. Code Ann. § 15-1-35; City of Mound Bayou v. Johnson, 562 So. 2d 1212, 1217-18 (Miss. 1990). In response to the defendants' arguments on this point, the plaintiffs state to the court that:

> [C]laims for false arrest and malicious prosecution are not cognizable until the arrestee has successfully challenged the arrest at trial or on appeal. Wells v. Bonner, 45 F.3d 90 (5th Cir. 1995). Therefore, the cause of action for false arrest based upon the reckless driving and failure to comply/disorderly conduct charge did not accrue until the Plaintiff's acquittal on the reckless driving charge and the abandonment of the prosecution on the failure to comply/disorderly conduct charge. While the statute of limitation on the false arrest, abuse of process and malicious prosecution claims in regard to the resisting arrest charge would appear to be barred by the one year statute under state law, these claims may nonetheless be asserted as a basis for a federal cause of action under 42 U.S.C. Section 1983 to which Mississippi's residual three year residual statute of limitations applies.

Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss and for Summary Judgment, p.4.

The plaintiffs misread the Wells decision. Judge Jolly, in Wells, was merely discussing the doctrine announced by the United States Supreme Court decision in Heck v. Humprey, --- U.S. ---, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), and its application to *§ 1983 claims* of malicious prosecution and false arrest. Wells, 45 F.3d at 93. Heck propagated the rule of civil rights law that a party cannot maintain a 1983 claim that, were he to prevail, would "necessarily imply the invalidity of his conviction or sentence" which arose out of the facts surrounding his claims. Heck, 114 S.Ct. at 2372, 129 L.Ed.2d at 394. With the information which is presently before the court, Heck does not appear to apply in this cause.

However, the plaintiffs do indeed have separate § 1983 claims under the same theories which underlie the intentional tort claims, and all of their § 1983 claims are governed by Mississippi's residual three-year statute of limitations. James v. Sadler, 909 F.2d 834, 836 (5th Cir. 1990); Thomas v. New Albany, 901 F.2d 476, 477 (5th Cir. 1990); Gates v. Walker, 865 F. Supp. 1222, 1230 (S.D. Miss. 1994). Because Congress has not provided a statute of limitations for civil rights actions under § 1983, federal courts borrow the general personal injury limitations period of the forum state. Owens v. Okure, 488 U.S. 235, 249-50, 109 S.Ct. 573, 581-82, 102 L.Ed.2d 594 (1989) ("Where state law provides multiple statute of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions."); Gartrell v. Taylor, 981 F.2d 254, 256 (5th Cir. 1993); Jackson v. Johnson, 950 F.2d 263, 265 (5th Cir. 1992). Under Mississippi law, the general residual statute of limitations is three years for claims arising on or after July 1, 1989, and six years for causes of action accruing before that date. Miss. Code Ann. § 15-1-49. The plaintiffs' § 1983 claims in this case accrued in 1994 or after, and therefore are properly constrained by a three-year limitations period. Nevertheless, the plaintiffs' state law claims and their related § 1983 claims are separate, independent causes of action. That plaintiffs' state law claims may be barred by the applicable statute of limitations has no effect upon their § 1983 claims.

Under Mississippi law, actions for the state law torts of false arrest and false imprisonment accrue at the time of arrest. Johnson, 562 So. 2d at 1217; Parker v. Game & Fish Comm'n, 555 So. 2d

725, 727 (Miss. 1989). Actions for abuse of process or malicious prosecution, however, accrue at the time that judgment is entered on the charges made against the plaintiff. Johnson, 562 So. 2d at 1217. Therefore, the plaintiffs' claims for false arrest and false imprisonment accrued in this case on the date Barney Luther arrested Mr. Smith - October 26, 1994. Consequently, the limitations period on those claims expired on October 26, 1995. The plaintiffs' claims for abuse of process, however, did not accrue until the County Court entered judgment on the charges against Mr. Smith on September 13, 1995. Therefore, the limitations period on those claims will not expire until September 13, 1996. The plaintiffs filed their complaint with this court on February 21, 1996.

The plaintiffs offer nothing to this court that would allow the prosecution of their state law claims for false arrest and false imprisonment beyond the one year period under Miss. Code Ann. §15-1-35. These two of the plaintiffs' state law claims shall be dismissed, for they have been brought outside of the relevant statute of limitations. The plaintiffs' state law claims for malicious prosecution and abuse of process, however, are not outside the limitations period and shall not be dismissed.

CONCLUSION

After careful consideration of the submissions and the record in this cause, the undersigned is of the opinion that the motion of the defendants should be granted in part and denied in part. All of the plaintiffs' claims for money damages against the defendant MSTC, as well as all of their claims for money damages against the defendant Barney Luther in his official capacity as a Special Agent of the MSTC, are barred by the immunity granted by virtue of the Eleventh Amendment. Further, the plaintiffs state law intentional tort claims of false arrest and false imprisonment are barred by the applicable one-year statute of limitations. However, the plaintiffs have pled sufficient facts, if proven true, which would overcome the defendant Luther's qualified immunity with regard to their § 1983 claims. As discovery has not yet begun in earnest in this case and the parties have yet to have the opportunity to avail themselves of the process, the court is also wary of addressing the merits of a motion for summary judgment. The parties shall proceed in this cause and engage in appropriate discovery.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of August 1996.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

CHARLES E. SMITH and AUDREY SMITH — PLAINTIFFS

vs. — Civil Action No. 4:96cv69-D-B

BARNEY LUTHER, in his individual capacity,
and the MISSISSIPPI STATE TAX COMMISSION — DEFENDANTS

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISMISS AND FOR
SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

1) the defendants' motion to dismiss and for summary judgment is hereby GRANTED IN PART;

2) the plaintiffs' claims for money damages against the defendant Mississippi State Tax Commission are hereby DISMISSED;

3) the plaintiffs' claims for money damages against the defendant Barney Luther in his official capacity as a special agent of the Mississippi State Tax Commission are hereby DISMISSED;

4) the plaintiffs' state law claims for false arrest and false imprisonment are hereby DISMISSED; and

5) as to the remainder of the plaintiffs' claims, the motion is hereby DENIED.

SO ORDERED, this the _____ day of August 1996.

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United States District Judge